2011 IL App (2d) 091274-U
Nos. 2—09—1274 & 2—09—1294 cons.
Order filed August 31, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ABDUL M. LOVE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. Nos. 05—CF—3811, 06—CF—160 Honorable Fred L. Foreman, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Although defendant was represented by counsel for the drug charge, the self-incriminating statements gathered by the police for the ensuing prosecution for solicitation to commit murder did not violate defendant's sixth amendment right to counsel, as defendant had not been charged with that offense at the time the defendant made the statements; the denial of defendant's motion to suppress is affirmed.

¶ 1 In two separate bench trials, defendant, Abdul M. Love, was convicted of two counts of solicitation of murder for hire (No. 06—CF—160) and of unlawful possession of a controlled substance with intent to deliver (No. 05—CF—3811). Defendant was indicted, arraigned, and

appointed counsel for the drug charge. While incarcerated and awaiting trial, the police interrogated defendant, without counsel's presence, about his alleged solicitation of a police informant to assist him in the elimination of two, key prosecution witnesses for the drug charge. After the interrogation, defendant was served with an arrest warrant for two counts of solicitation to commit murder for hire. In this consolidated appeal, defendant contends that the self-incriminating statements made during police investigation of the solicitation charge must be suppressed as they were taken without counsel's presence in violation of his sixth amendment rights. Defendant does not raise any issues regarding his conviction of unlawful possession of a controlled substance with intent to deliver. We affirm.

¶ 2 BACKGROUND

¶ 3 On October 26, 2005, defendant and Michael Nelson were indicted with one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2004)), and the court appointed counsel to represent defendant (appeal No. 2—09—1294). While incarcerated and awaiting trial on the drug charge, the police began investigating defendant for solicitation of murder for hire. The police interrogated defendant after an Illinois State trooper, posing as a murderer for hire, conducted two authorized overhears. On February 1, 2006, defendant was indicted with two counts of solicitation of murder for hire (720 ILCS 5/8—1.2(a) (West 2006)) (appeal No. 2—09—1274).

¶ 4 On December 4, 2006, defendant filed a motion to suppress oral and written statements made by defendant. His motion alleged that the oral statements made during police interrogation were inadmissible because he did not knowingly, voluntarily, and intelligently waive his constitutional rights under *Miranda*, and because the statements were induced by promises made to him by the

police officers conducting the interrogation. Defendant also alleged that a written statement that he partially completed and then tore with the intent to destroy (later re-constructed by police) was inadmissible.

¶ 5 At the hearing on the motion to suppress, the officers who interrogated defendant testified that they read defendant his *Miranda* rights, that he was given the opportunity and appeared to read the form, and indicated that he understood his rights before initialing and signing. After defendant signed the waiver form, the officers informed defendant that they were investigating him on suspicion of solicitation of murder and advised him that they had spoken with Charles Newcomb, the jailhouse informant, and Nelson, who were cooperating in the investigation. Defendant either volunteered or was asked to give his side of the story and made statements admitting that he wanted to hire someone to murder Nelson and Officer Domenic Cappelluti, the officer who arrested defendant for the drug charge, so they could not testify against him in the drug case. Both of the officers who interviewed defendant testified that defendant stated he was willing to talk to the officers and that he never asked to speak to an attorney. Detective Giamberduca stated that he knew defendant had an active case when he was interrogated at the police station. He also conceded that he "would expect" that counsel represented him in the active case.

¶ 6 The officers testified that, after defendant gave his oral statement, he agreed to give a written statement. The officers saw defendant writing his statement via a video monitoring system. They saw defendant write one page and then tear the page and place the shreds into a partially filled can of pop. When the officers re-entered the interview room, defendant indicated that he no longer wanted to make a written statement. The police re-constructed the written statement. After defendant was returned to jail, he was served with an arrest warrant for two counts of solicitation to

commit murder for hire (720 ILCS 5/9—1(a)(1); 5/8—1.2(a) (West 2006)) (appeal No. 2—09—1274).

¶ 7 The trial court granted the motion in part and denied it in part. The court found that the waiver of *Miranda* rights was voluntarily, knowingly, and intelligently made, and that defendant's oral statements were voluntary and could be admitted. The court further found that defendant had invoked his right to remain silent when he tore the written statement, and therefore the re-constructed written statement and the testimony regarding its contents would not be admitted in the State's case-in-chief.

¶ 8 The State elected to proceed on the solicitation charges first. Following a bench trial, the trial court found defendant guilty of both counts of solicitation of murder for hire. The judgment was entered on October 30, 2008. After a stipulated bench trial on the drug charge, the trial court found defendant guilty of unlawful possession of a controlled substance with the intent to deliver on July 15, 2009. On November 20, 2009, defendant filed separate motions for a new trial in both cases, which were denied.

¶ 9 On November 23, 2009, the trial court sentenced defendant to concurrent prison terms of 25 years for the solicitation convictions, consecutive to a 15-year sentence on the unlawful possession conviction. Defendant timely appeals. We granted defendant's motion to consolidate the appeals.

¶ 10 ANALYSIS

¶ 11 Defendant does not challenge the sufficiency of the evidence. Rather, his claim of error relates to the trial court's denial of his motion to suppress statements because the police interrogated him outside the presence of his counsel in violation of his sixth amendment rights.[1] The State

[1] Defendant's briefs do not indicate whether he is challenging his statements to the police,

contends this claim is forfeited because defendant did not present this argument at the motion to suppress or in a posttrial motion. We agree with the State. In addition to the questionable timeliness of defendant's motion for a new trial, the sixth amendment argument defendant now raises on appeal is significantly different from the fifth amendment claim brought before the trial court. Defendant responds that, even if the claim has been forfeited, we should review the issue as plain error.

¶ 12 It is axiomatic that, in order to preserve issues for review, a defendant raise the error at the time of the claimed error as well as in a posttrial motion. *People v. Lewis*, 234 Ill. 2d 32, 40 (2009); see also 725 ILCS 5/116—1 (West 2010). The failure to do so will generally result in forfeiture of the claim on appeal; however, forfeiture is not an absolute bar to our review. Precedent dictates that the rules of forfeiture present limitations on the parties and not on the reviewing court. *People v. Davis*, 213 Ill. 2d 459, 470 (2004); *People v. Vargas*, 409 Ill. App. 3d 790, 793 (2011).

¶ 13 Additionally, Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), known as the "plain-error" doctrine, carves out an exception to permit review of issues otherwise procedurally defaulted. *Lewis*, 234 Ill. 2d at 42. Our supreme court described its operation in *People v. Piatkowski*:

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial

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to the informant, or both.

process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186–87 (2005)).

¶ 14 Significantly, "plain error is not limited to cases where the putative error causes the conviction of an innocent person; it also applies to cases where the putative error affects the fairness or integrity of the trial." *Herron*, 215 Ill. 2d at 186.

¶ 15 Rule 615 specifically provides that, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Ill. S.Ct. R. 615(a) (eff. Jan. 1, 1967). "Essentially, the fairness of the trial must be undermined." *People v. Keene*, 169 Ill. 2d 1, 17 (1995). The defendant bears the burden of persuasion under each prong of the doctrine. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Where a defendant is unable to establish plain error, it is incumbent upon us to honor the procedural default. *Keene*, 169 Ill. 2d at 17.

¶ 16 Necessarily, we must first determine whether an error actually occurred. *Lewis*, 234 Ill. 2d at 43 (citing *People v. Walker*, 232 Ill. 2d 113, 124 (2009)). We therefore consider the substance of defendant's claim of error. *Walker*, 232 Ill. 2d at 125; *Lewis*, 234 Ill. 2d at 43.

¶ 17 In reviewing a trial court's ruling on a motion to suppress, findings of fact made by the court will be upheld unless such findings are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). The question of whether the evidence should be suppressed, however, is reviewed *de novo*. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004). No one disputes that defendant did not have counsel with him during the police interrogation or that defendant signed a waiver of his *Miranda* rights prior to the interrogation. Therefore, the question of whether the statements made by defendant were taken in violation of his sixth amendment rights is a question of law and is reviewed *de novo.*

¶ 18 The Sixth Amendment of the United States Constitution guarantees a right to counsel after the initiation of adversarial proceedings, and guarantees counsel's presence during any communication between State agents and the defendant. U.S. Const. Amend VI; *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). The sixth amendment right to counsel attaches at or after the initiation of adversarial judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *People v. Garrett*, 179 Ill. 2d 239, 247 (1997) (citing *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)). The defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the sixth amendment right to counsel initially attaches. *Garrett*, 179 Ill. 2d 239, 247 (1997) (citing *Moran v. Burbine*, 475 U.S. 412, 428 (1986)).

¶ 19 Defendant contends that, after he had been indicted on the drug charge, he could not lawfully have been questioned by police outside the presence of his attorney, and the "post-indictment interrogations of the defendant by police at the police station violated this well-established right to counsel." We disagree.

¶ 20 The sixth amendment right to counsel is offense specific. Therefore, merely because a defendant is represented by counsel on a charged offense does not prevent the authorities from questioning the defendant about other unrelated offenses. See, e.g., *People v. Maxwell*, 148 Ill. 2d 116, 128–29 (1992); *People v. Wahl*, 285 Ill. App. 3d 288, 298 (1996). Although adversarial proceedings had begun on the drug charge, they had not begun on the solicitation of murder charges, as defendant had not yet been indicted or formally arrested on those charges. Accordingly, the constitutional right to counsel had not attached with regard to the uncharged conduct.

¶ 21 Defendant contends that his case is similar to *People v. Brown,* 358 Ill. App. 3d 580 (2005). In *Brown,* the defendant was indicted, arraigned, and represented by counsel for murder. The State did not have any direct evidence of the defendant's guilt. *Brown,* 358 Ill. App. 3d at 584. The State, however, introduced the testimony of the defendant's jail cell mate to whom he had made a series of self-incriminating statements. *Brown*, 358 Ill. App. 3d at 584. The cell mate "authenticated and identified tape recordings and documents that corroborated his testimony." *Brown,* 358 Ill. App. 3d at 584. The cell mate testified that the defendant had confessed to the murder charge, and that the defendant had solicited his assistance in a plot to murder one of the prosecution witnesses, and to threaten and intimidate other prosecution witnesses. *Brown*, 358 Ill. App. 3d at 586. His testimony was corroborated by a series of eavesdropped conversations with the defendant, recorded with the cell mate who was working secretly for the State. *Brown*, 358 Ill. App. 3d at 586. Two of the taped conversations between the defendant and his cell mate, admitted into evidence, corroborated the cell mate's testimony. Additionally, the "jurors were told that the defendant's preferred method of defense on the murder charge was to procure the help of a fellow criminal to commit another murder, along with intimidation of State witnesses, obstruction of justice, and subornation of perjury." *Brown, 358* Ill. App. 3d at 587. This testimony and tape-recording provided the prosecution with evidence that "evinced consciousness of guilt on the pending murder charges, while [the defendant's] legal representative slept, totally unaware of the fact that the prosecution had decided to contact his client and have a few words with him." *Brown*, 358 Ill. App. 3d at 587.

¶ 22 The appellate court held that this violated defendant's sixth amendment right to counsel because the recorded conversations were used in the underlying murder prosecution. *Brown*, 358 Ill. App. 3d at 587. Here, unlike in *Brown*, the prosecution could use the incriminating statements

made by defendant during the time he was represented for the drug charge, as defendant's constitutional right to counsel had not attached to the charges of solicitation, and those statements were used only by the prosecution for the solicitation charges. This does not violate the sixth amendment right to counsel's presence. As the *Brown* court observed:

> "We would not be troubled by the admission of the self-incriminating statements, and the supporting documents, in any ensuing prosecution for solicitation to commit murder, solicitation to intimidate State witnesses, solicitation to obstruct justice, or solicitation to suborn perjury. None of those offenses was charged at the time of [the cell mate's] endeavors to gather self-incriminating statements. The defendant had no existing constitutional promise of a legal buffer between himself and the State with regard to uncharged conduct. However, what happened here was an intentional effort to bolster the State's case against the defendant on pending murder charges, by intentionally disregarding the attached constitutional right to counsel." *Brown*, 358 Ill. App. 3d at 588-89.

¶ 23 Defendant also relies on *Maine v. Mouton*, 474 U.S. 159 (1985), *Massiah*, 377 U.S. 201, and *Brewer*, 430 U.S. 387. Those cases are also distinguishable from the present case, as the defendants' statements in each of those cases were used against the defendants in their prosecutions for the underlying crimes. *Maine*, 474 U.S. at 180; *Messiah*, 377 U.S. at 205-06; *Brewer*, 430 U.S. at 394. In the present case, the information obtained through the statements was used solely to prosecute the offenses committed in the solicitation case.

¶ 24 Defendant also maintains that, since the drug case and the solicitation for murder case were so closely related, his sixth amendment right to counsel attached to the drug case triggered his right to counsel in the solicitation case. Defendant asserts that the cases are closely related because, to

establish motive, the State was permitted to prove up the drug incident during the solicitation trial. Defendant cites *Wahl* and *People v. Clankie*, 124 Ill. 2d 456 (1988), in support of his argument.

¶ 25 In *Wahl*, the defendant was convicted of six counts of aggravated criminal sexual abuse, one count of aggravated criminal sexual assault, and one count of attempted aggravated criminal sexual assault. The charges arose from the defendant's acts committed against several children living in a home for dependent children. During the investigation, defendant made admissions about his conduct, which resulted in the defendant's arrest. *Wahl*, 285 Ill. App. 3d at 291-92. A police officer interviewed the defendant after his arrest on March 11, 1991, and learned that the defendant had an attorney when he was read *Miranda* rights. He then told the defendant that he would not be able to inform the prosecutor that the defendant had cooperated with him because he had learned from talking with other children that the defendant had not been completely honest. The defendant then made additional statements against his own self-interest. *Wahl*, 285 Ill. App. 3d at 293.

¶ 26 The defendant argued on appeal that the statements elicited during the jail interview violated his sixth amendment right to counsel as the uncharged offenses were closely related to the charged offenses. *Wahl*, 285 Ill. App. 3d at 297-98. Although there was no bright line test for determining whether the right to counsel may be triggered on an uncharged, yet closely related offense, when the right to counsel has attached in a charged offense, we suggested the following analytical framework to use:

> "First, a court should determine whether the charged and uncharged offenses were committed against the same individual or entity. Second, a court should consider the amount of time between the acts forming the basis for the charged and uncharged offenses. The briefer the time period between the acts giving rise to the charged and uncharged offenses,

> the greater the likelihood the facts were part of the same factual transaction. This, in turn, militates in favor of finding that the sixth amendment right to counsel has attached to the uncharged offense. Third, a court should be watchful for any evidence that the investigative authorities of a second sovereign interrogated the defendant-in an attempt to elicit evidence concerning the facts forming the basis of an offense charged by the first sovereign-so the second sovereign might bring a similar charge based on the same factual transaction. A discussion of these factors should form the basis of a court's analysis of the closely related offenses exception." *Wahl*, 285 Ill. App. 3d at 299–300.

¶ 27 We observed that the most important factor is the identity of the victims or targets of the offenses. *Wahl*, 285 Ill. App. 3d at 300. If the uncharged offense was committed against the same individual or entity, a strong possibility exists that the closely related offenses exception may apply. See *Brewer*, 430 U.S. at 389–98 (holding that use of defendant's admission that he killed his abductee was violative of sixth amendment right to counsel where admission was made after defendant was indicted for abducting the victim and before defendant's attorney met with defendant); *Clankie*, 124 Ill. 2d at 466 (applying exception where defendant was convicted of three instances of burglarizing the same person's home).

¶ 28 Accordingly, we held that the charges filed after the March 11, 1991, meeting with the defendant were not closely related to the pre-March 11, 1991, charges, that each of the post-March 11, 1991, charges concerned different victims from the pre-March 11, 1991, charges, that the defendant's offenses were committed over a long time span, and that the case did not implicate the problem of separate sovereigns attempting to bring similar charges against the defendant based on the same operative facts. *Wahl*, 285 Ill. App. 3d at 301.

¶ 29 Applying the factors here, we hold that they do not support the closely related exception, particularly because the victims and the incidents are different. The second element, the time elapsed between the possession of drugs and defendant's arrest for solicitation of murder, is of no relevance given the facts of this case and the nature of the crimes charged. Additionally, although defendant's arrest on the drug charge did provide police with evidence which they might not otherwise have obtained, as it led to defendant's warrant of arrest for solicitation of murder, this does not change the fact that the drug offense and the solicitation of murder offenses were, in every constitutionally significant aspect, separate crimes. See *People v. Sealey*, 311 Ill. App. 3d 120, 125 (1999) (citing *United States ex rel Espinoza v. Fairman*, 813 F.2d 117, 121 n. 1 (7th Cir.1987) (overruled on other grounds by *McNeil v. Wisconsin*, 501 U.S. 171 (1991)).

¶ 30 Our supreme court in *Clankie* adopted the closely related offenses exception to the offense-specific right to counsel. *Clankie*, 124 Ill. 2d at 462-63 (interpreting *Moulton*). In *Wahl*, we determined that the true purpose of the *Clankie* exception is to prohibit interrogation of a defendant on an uncharged criminal offense if the interrogation functions as a continuation of the investigation of the factual transaction forming the basis of the previously charged offense. *Wahl*, 285 Ill. App. 3d at 299. Clearly, this did not occur here because the solicitation investigation was not a continuation of the drug investigation.

¶ 31 Consequently, we find no plain error to excuse defendant's forfeiture of this issue.

¶ 32 CONCLUSION

¶ 33 For the reasons stated, we affirm the convictions for solicitation of murder for hire and possession of a controlled substance with intent to deliver.

¶ 34 Affirmed.